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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1972.

**No. 72-830**

JOHN W. LEWIS, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE STATE OF ILLINOIS,

*Petitioner,*

*vs.*

ILLINOIS STATE EMPLOYEES UNION, COUNCIL 34, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO, AN UNINCORPORATED LABOR ORGANIZATION; ET AL.,

*Respondents.*

## REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

GILBERT A. CORNFIELD,
KLEIMAN, CORNFIELD & FELDMAN,
Suite 452,
10 South LaSalle Street,
Chicago, Illinois 60603,
*Attorneys for Respondents.*

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO 56

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## REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

### OPINION BELOW.

The opinion of the United States Court of Appeals for the Seventh Circuit is not as yet reported. The docket number for the case is No. 71-1619.

### STATEMENT OF THE CASE.

Suit was commenced by a labor organization and a substantial number of its members, employed in non-policy making positions in the Office of the Secretary of State of

the State of Illinois. The Respondents represented themselves, as well as other members of the organization similarly employed by the Secretary of State. Defendant to the action has been the duly appointed Secretary of State, sued as an individual and in his official capacity.

Jurisdiction of the federal court was founded under the First and Fourteenth Amendments to the Constitution of the United States of America and the United States Civil Rights Act, Title 42 United States Code Section 1983.

The Complaint was filed on January 22, 1971 alleging, by verification, that the individual Plaintiffs had been discharged, and that other members of the class were to be terminated from their positions with the Office of the Secretary of State without any statement of reasons or opportunity to be heard. In addition, the Complaint alleged that the Plaintiffs believed that the discharges were actually for one or more of the following reasons:

> (a) Each and all of the individual Plaintiffs have not been members of the regular organization of the Republican Party, a political organization, in the state, county, and municipalities where they reside and work; and/or
>
> (b) Each and all of the individual Plaintiffs have not contributed at all or sufficiently to said Republican Party; and/or
>
> (c) Each and all of the individual Plaintiffs have not campaigned and worked for candidates of the regular organizations of the aforesaid Republican Party under the direction of the officers of said Party.

The Complaint also sought a general declaratory judgment. The Plaintiffs alleged that the Defendant, in his official position as Secretary of State, imposed a general policy of terminating non-policy making employees without any statement of reasons or opportunity for an impartial

hearing to review such reasons. The Plaintiffs also alleged that the Defendant pursued a general policy of terminating employees who have not met the standards of participation in his political party, as set forth above.

The Complaint sought a declaratory judgment of the rights of the Plaintiffs and the members of the class, as well as appropriate equitable and legal relief.

The District Court summarily dismissed the complaint on the basis that no justicable cause of action could be substantiated by the Plaintiffs. Simultaneous with the dismissal of the suit, the District Court disallowed the Plaintiffs' request to engage in pre-trial discovery procedures concerning the events surrounding the dismissals of the Plaintiffs and the class they represent and the individuals hired by the new Secretary of State to replace them.

The Court of Appeals reversed the decision of the District Court and remanded the matter for a full evidentiary hearing. The majority of the Court of Appeals held that the District Court was in error in dismissing the action of the Plaintiffs as a matter of law.

## REASONS FOR DENYING THE WRIT.

It is the Respondents' position that a review by the Supreme Court of the United States of the underlying substantive issues presented by the Petition for Writ of Certiorari is premature. There is no question that the subject litigation involves major federal questions under the Constitution of the United States, but the Respondents respectfully submit that review by the Supreme Court at this stage in the proceeding would not substantially resolve these federal questions but rather tend to engender a climate of confusion.

The Petitioner contends that the subject decision of the Court of Appeals clearly creates a conflict in the interpretation and application of constitutional principles to public employment among various federal and state courts. The Respondents must acknowledge that questions arising from the various state and local patronage systems in relation to rights under the First and Fourteenth Amendments to the Constitution of the United States are substantial and must at some point be resolved. The majority of the Court of Appeal's panel in the subject case has held that public employers do not have the unbridled authority to summarily dismiss non-policy making employees in the application of patronage. The Respondents submit that unless the Supreme Court of the United States is prepared to rule that public employers do have such unbridled authority, the grant of a writ of certiorari at this point would be premature.

In his majority opinion Judge Stevens points out that there are basically three areas of defense which have been raised by the Defendant-Petitioner. Firstly, Judge Stevens left open the question of whether a public employee who knowingly accepted his job on the supposition that he would be fired if the appointing officer was replaced by a member of the opposite party had any substantive rights or remedies under the Constitution and the United States Civil Rights Act. Secondly, Judge Stevens acknowledged in his opinion that the Plaintiffs-Respondents based their complaint upon the rights of non-policy making public employees. The Defendant-Petitioner's position in part is that the right to terminate at will is essential to an efficient governmental operation by the employing public official. Although Judge Stevens doubted that the type of employment responsibilities represented by the Plaintiffs involved political considerations, he did state that this represented a mixed issue of law and fact that first should be heard by the District Court.

Lastly, Judge Stevens noted the Defendant-Petitioner's general position that the efficient administration of a large governmental office required that the public official be allowed to make substantial changes in his administration without court review. Again, Judge Stevens appears to have dismissed the validity of the Defendant-Petitioner's general position but recognizes that this would be an area which could be covered and considered by the District Court upon review of testimony and other forms of evidence.

Therefore, it appears to the Plaintiffs-Respondents that a review by the Supreme Court at this juncture would be in somewhat of a vacuum. It is true that the Supreme Court could hold that the Defendant-Petitioner has complete authority to terminate at will without a statement of reasons and not be subject to review by the federal courts in the application of constitutional principles. But if the majority of the Supreme Court is not prepared to make such a far reaching decision, then review by the Supreme Court should await the development of evidence through appropriate pretrial discovery procedures and a thorough evidentiary hearing before the District Court. After that point, the Supreme Court would have before it the reasons for the dismissal of the affected public employees, the nature of their employment, the type of governmental administration involved and their reasonable expectations. The Supreme Court could also review, in light of that full disclosure, the range of appropriate remedies, if any. Under these circumstances the guidelines which would be developed by the Supreme Court for public employees and their employers would reflect the substance and nuances of such employment which would emerge from a full development of the evidence in this case and would offer clear direction to the federal courts and affected parties throughout the country.

We submit that our position would not engender further confusion or conflicts among the courts. We note in this regard that the majority opinion in *American Federation of State, County and Municipal Employees* v. *Shapp*, 280 A. 2d 375 (Pa. S. Ct., 1971), relied heavily upon the stipulated fact that all the affected public employees had been "sponsored" for their employment by a regular political organization and furthermore that that fact was stipulated to be the sole basis for their discharge. These facts are still in substantial dispute in the subject case and was in part the basis for the decision of the United States Court of Appeals as reflected in Judge Steven's opinion to remand the dispute to the District Court for a full hearing. In *Alomar* v. *Dwyer*, 447 F. 2d 282 (1971), cert. denied 404 U. S. 1020 (1972), there was also no dispute of fact that the plaintiff public employee had been discharged for solely political reasons. Furthermore, plaintiff in that case had apparently raised no issue concerning the failure of the public employer to advise the plaintiff as to the specific reasons and justification for the dismissal and an opportunity to be heard.

The Defendant-Petitioner relies heavily upon the decision of the United States Court of Appeals for the Eighth Circuit in *Norton* v. *Blaylock*, 409 F. 2d 772 (C. A. 8, 1969), for the proposition that there is conflict among the federal courts of appeal. There is nothing in either the Court of Appeals' decision in *Norton* v. *Blaylock* or the district court decision which would indicate that either court dealt directly with the question of patronage. The only issue before the district court was whether the public employer was bound by constitutional principles to accept the recommendation for continued employment of the plaintiff rendered by a merit board pursuant to a state statute. The District Court concluded that the question was one of state law and that the public employer was not bound to accept

the recommendation. The United States Court of Appeals affirmed that view. The references to political considerations by employing agencies in both the Court of Appeals and District Court decisions in *Norton* v. *Blaylock* were merely part of generalized statements covering the rights of public employers and were clearly dicta and of no apparent relevance to the decisions. The Supreme Court might also note that the plaintiff employee in *Norton* v. *Blaylock* held a major executive position within the state government.

The Plaintiffs-Respondents have already submitted to the Supreme Court their Petition for a Writ of Certiorari in the subject case concerning the "due process" issue which was rejected by the Court of Appeals. Our position relative to that issue has been fully set forth in our Petition. Both the decision of the Court of Appeals and the Petition for a Writ on the due process issue underscore the fact that review by the Supreme Court at this juncture and the issues raised in the Defendant-Petitioner's Petition for a Writ are premature. We strongly urge the Supreme Court to consider that review only of the due process issue at this point in the litigation. This issue was not involved in *Alomar* and was rejected as germane by the majority in *American Federation of State, County and Municipal Employees* v. *Shapp*. If the Supreme Court determines that under the circumstances of the subject case Plaintiffs are entitled to a statement of reasons and some form of hearing before protracted federal litigation is commenced, then all parties can substantially reduce the scope of the prospective proceedings in the District Court and substantially refine the issues of law and fact which would be left for hearing

by the District Court and, we presume, eventual review by the Court of Appeals and the Supreme Court of the United States.

Respectfully submitted,

GILBERT A. CORNFIELD,
KLEIMAN, CORNFIELD & FELDMAN,
Suite 452,
10 South LaSalle Street,
Chicago, Illinois 60603,
*Attorneys for Respondents.*